Politicizing America's State Courts

Critical Challenges Facing the Judiciary

Today judges and the special rules that insulate them from politics are under political attack. State judicial elections have become increasingly like elections for political office: expensive, contentious, partisan, political, and dominated by special interests. Judicial elections today present four critical challenges to the ability of elected state judges to fairly and impartially uphold the rule of law. These challenges have taken many other state judiciaries by surprise. Unless the California bench and bar devote conscientious attention to them, there is little reason to believe that these same challenges will not also overrun the judiciary of California.

SHELLEY EADES

By
Roger K. Warren

Justice for Sale

The first critical challenge is the ever-rising tide of campaign spending, television advertising, and special interests. Electing state court judges attuned to a particular special interest or ideology, and defeating those not so attuned, is increasingly viewed by political parties and special interests as politics—and business—as usual. Reaching voters with a cleverly crafted political advertisement usually requires television time,

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and television time is very expensive. So it takes money to be successful. Consider that:

- Campaign contributions to candidates for state supreme courts increased more than 750 percent between 1990 and 2004.
- Candidate fundraising broke records in 19 states in 2000 and 2004 and in at least four more states in the recent 2006 elections.
- Successful supreme court candidates now sometimes raise more money than many gubernatorial or U.S. Senate candidates.
- The three candidates for Alabama chief justice in 2006 reported a combined $6.7 million in campaign contributions.
- The candidates raising the most money have won more than 80 percent of recent races.
- More than three-quarters of campaign contributions come from political parties and special interests: the business community, lawyers, and labor organizations.
- The U.S. Chamber of Commerce spent an estimated $50 million on judicial races between 1998 and 2004.
- The business community claimed victory in 12 of the 13 state supreme court races that it targeted in 2004.

Limits Easily Evaded

Although contributions to judicial candidates are subject to prescribed limits in many states, those limits have proven largely ineffective. Contribution limits typically do not prevent organizations from contributing through their employees and other related individuals and entities. The limits can also be easily evaded through contributions to political action committees (PACs), political parties, and other independent third parties. The sources of contributions to "independent" groups are typically not subject to disclosure, concealing the involvement of special interests from the voters.

The Cost of TV Ads

Fueling the rising cost of judicial election campaigns is the high cost of television advertising. In 2004, television ads appeared in four times as many states as in 2000 at more than two and a half times the cost. In 2006, ads appeared in 10 of the 11 states with contested supreme court elections. Special-interest groups and political parties pay for almost 90 percent of the attack ads. In 2006, 95 percent of third-party spending on TV ads came from business groups. Candidates airing the most ads usually win; the amounts spent on ads supporting the victors are double the amounts spent on ads supporting the losing candidates.

A 2002 survey of state judges revealed that 58 percent of elected judges felt under pressure to raise money for their campaigns; half of those judges felt they

Judges on Trial

November 2006 Ballot Results

Here are the results of key elections affecting judges on the November 2006 ballot. Although all the proposed measures failed, the election marked the first time so many measures challenged the authority of judges.

California		
Proposition 90	Would have required a jury, not a judge, to determine in eminent domain cases whether the taking of private property was for a public use and would have prohibited "unpublished" opinions in eminent domain cases.	FAILED **52.2% opposed**
Colorado		
Amendment 40	Would have limited judges of the Colorado Court of Appeals and justices of the Supreme Court to a maximum term of 10 years.	FAILED **53.6% opposed**
Oregon		
Measure 40	Would have required Oregon Supreme Court justices and Court of Appeals judges to be elected by district rather than statewide.	FAILED **55% opposed**
South Dakota		
Amendment E	Would have eliminated judicial immunity, permitted civil actions against judges and all others covered by judicial immunity, created a special grand jury with power to remove judicial immunity and criminally indict and appoint a special trial jury to conduct subsequent criminal trials.	FAILED **89% opposed**

were under "a great deal" of pressure. More important, 32 percent said they felt contributions had some or a great deal of influence on judges' decisions.

A recent examination of the Ohio Supreme Court found that the justices ruled in favor of their contributors 70 percent of the time. One justice voted in favor of his contributors 91 percent of the time. One campaign fundraiser confided, "I always knew you could buy the executive and legislative branches. But I never thought you could buy the judiciary, and that's what really troubles me." Justices rarely recuse themselves on the basis of a party's prior contributions. "It's pretty hard in big-money races not to take care of your friends," one retired chief justice has acknowledged. "It's very hard not to dance with the one who brung you."

Public Trust Undermined

Campaign contributions also undermine the public's trust in the impartiality of the judiciary. A 2004 national public opinion survey found that 71 percent believe that judicial campaign contributions affect judges' decisions in the courtroom. As a *New York Times* editorial recently concluded, "There is no perfect way to choose a judge. But to undermine the whole purpose of the court system by allowing special interests to buy judgeships, or at least try to, is the worst system of all."[1]

Attacking Judges

The second critical challenge to judicial impartiality arises from disagreement with judicial decisions and takes the form of political attacks on judges and courts. Such attacks certainly aren't new. Yet even judged by a historical standard, the intensity, breadth, and nature of current attacks seem unprecedented. Attacks on state judges come not only from politicians and political parties but also from the special-interest groups that often constitute their political base. Special-interest groups have increasingly come to view the judiciary, in the words of one such group, as something "to be gamed and captured—just like Congress or the statehouse." One spokesperson for the business community thinks it's more than a game: "We've declared war on judges who aren't doing their duty," he said. A spokesperson for a state building industry group said that state court justices "must answer for their actions." "Facing the retribution of voters is the key component to keeping justices in check," she commented.

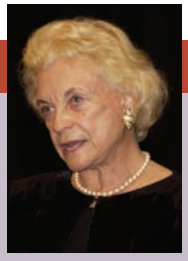
Religious conservatives have been particularly active in attacking judges on issues such as school prayer, abortion, and gay marriage. Colorado evangelist James Dobson compared the wrongs committed by black-robed judges with those of white-robed members of the Ku Klux Klan. Evangelist Pat Robertson claimed that "liberal judges" pose a more serious threat to America "than a few bearded terrorists who fly into buildings."

Politicians and political parties regularly attack judges as a means of inciting their respective political bases. "A good fight on judges does nothing but energize our base," said Republican Senator John Thune of South Dakota. Even the *Wall Street Journal* recently editorialized that a judicial "filibuster fight would be exactly the sort of political battle Republicans need to energize conservative voters after their recent months of despond."[2] Indiana Chief Justice Randall Shepard has observed that in many instances "judges are not the target at all" but "just roadkill for some other venture."

Attacking judges has been lucrative for special interests as well. In April 2004, for example, Dobson formed a new PAC to support various political issues and attacks on judges. In its first

SUMMIT OF JUDICIAL LEADERS • NOVEMBER 2006

O'Connor's Second Thoughts



SHELLEY EADES

Retired Supreme Court Justice Sandra Day O'Connor provided one of the most surprising remarks at November's Summit of Judicial Leaders.

In her closing-day luncheon remarks, Justice O'Connor said she has become increasingly concerned about the challenges facing judges, lawyers, and court administrators in preserving a fair and impartial judiciary.

"The level of unhappiness with judges today is at a very intense level. We hear the criticisms in the halls of Congress, in state legislatures, and from the public as well," she said.

The retired justice then alluded to the Supreme Court's decision in *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, which struck down a state ethics canon that prohibited judicial candidates from "announcing his or her views on disputed legal or political issues." Lower federal courts have expanded the reach of *White* significantly, ushering in a new era of politics in judicial elections.

O'Connor was a part of the 5–4 majority in *White* and said she normally never looks back at her decisions.

"I made it a policy as a judge to do the best I could with each case I had to decide, then make a decision, then not look back. Do the best you can and go forward. Don't second-guess," O'Connor told attendees.

"But that *White* case, I confess, does give me pause."

She commented that the Supreme Court may revisit the question to "flesh out the issues."

six months—the period leading up to the November 2004 elections—the new PAC raised $8.8 million.

We are also witnessing increasing attacks on the courts themselves and efforts to drastically change state judicial selection processes to subject judges to greater popular and political control. There are initiative efforts to replace judicial appointments with contested elections in some states and legislative efforts to require senate confirmation of gubernatorial appointments and reconfirmation upon every new term of office. Such efforts span the country. Bills have been introduced in the Georgia Legislature to return to partisan judicial elections. In at least three states, constitutional initiatives appeared on the fall 2006 ballot that sought to place checks on judges. A Colorado initiative sought to expand the state's term limits to cover appellate justices, and an Oregon initiative would have required appellate judges to be elected in the districts in which they reside. One of the most well publicized sought to essentially abolish the doctrine of judicial immunity. The J.A.I.L.4Judges (Judicial Accountability Initiative Law) initiative on the November 2006 South Dakota ballot would have created a special grand jury with jurisdiction to determine the applicability of judicial immunity, to indict, and to impanel a special trial jury to adjudicate and sentence offending judges. Only an active and well-funded campaign against the initiative resulted in its overwhelming defeat. (See "Judges on Trial," page 9.)

Forcing Judges to Take Positions

A recent development constitutes the third critical challenge facing fair and impartial judiciaries: judicial candidates are now free to—and pressured to—announce their views on hot-button social and political issues. State codes of judicial conduct generally admonish candidates for judicial office to refrain from political activity that is inconsistent with upholding the integrity, independence, and impartiality of the judiciary. Over the last four years, however, restrictions on political activities of judicial candidates have been found unconstitutional by the federal courts. The result is a new politics of judicial elections.

The leading case is *Republican Party of Minnesota v. White,* in which the U.S. Supreme Court found that a Minnesota canon prohibiting a candidate from "announcing his or her views on disputed legal or political issues" violated a candidate's freedom of speech.[3]

Four months after *White,* the Eleventh Circuit held sua sponte in *Weaver v. Bonner*[4] that a Georgia canon prohibiting judicial candidates from personally soliciting campaign contributions was unconstitutional under the reasoning of *White.* Although Justice Antonin Scalia's opinion in *White* had carefully observed that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office," the *Weaver* opinion flatly asserted that "the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns."

The impact of this expansive reading of *White* on judicial elections was immediate. Supreme court candidates blatantly announced their views on abortion, gun possession, right to life, gay marriage, and other disputed legal and political issues. One candidate for state chief justice in 2006 announced that "state supreme court judges should not follow obviously wrong [U.S. Supreme Court] decisions simply because they are precedents." Another supreme court candidate said that judicial candidates who failed to disclose their personal views were "cowardly."

Once judicial candidates were free to express their views on legal and political issues, elected judges were immediately pressured by special interests to do so, principally through distribution of questionnaires eliciting their views on issues of concern to the particular special interest.

At least four recent federal district court opinions arise from such questionnaires and reach similar results. In Kentucky, North Dakota, Alaska, and Kansas a right-to-life or other group distributed questionnaires to judges seeking their views on controversial issues. When judges declined to answer, citing the "pledges and promises," "commitments," and "recusal" canons of their state ethics codes, the groups filed suits claiming the three provisions were unconstitutional under *White.* The four federal district courts all held that the first two challenged provisions were unconstitutional under *White.*[5]

The courts upheld the states' recusal provisions requiring a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. All four courts made clear that their decisions did not *require* judges to answer such questionnaires, and one court said that "a judicial candidate who responds to a survey…may indeed create a serious ethical dilemma for himself or herself that would require recusal at a later date."

As construed by the lower federal courts, *White* has introduced a new brand of politics into judicial elections—treating candidates for judicial office like politicians running for political office—that threatens to undermine judicial independence and judicial restraint while providing only illusory public benefit. To avoid electoral opposition or obtain electoral support, judicial candidates are pressured to express personal views that are an improper basis of judicial decision in the first place and irrelevant to any issue in the vast majority of cases. In those cases in which a judge's previously stated views are relevant the judge may very well be required to recuse. Having obtained election to office on the basis of the previous announcement, the judge might reasonably be expected to now feel some pressure to keep the earlier "promise" or "commitment." The judge's recusal in turn deprives those voters and special interests who relied on the judge's earlier announcement of the entire consideration for

which they provided their electoral support. It is difficult to imagine a judicial election process more likely to destroy public trust in the proper role of an elected judiciary.

Partisan Politics in Judicial Elections

The final critical challenge is the threatened increase of partisan involvement in nonpartisan judicial elections. The United States has consistently sought from the very beginning of the republic to insulate state judges from improper political influence. First, through lifetime appointments (in most of the original 13 states), then in the 19th century through popular election under special rules unique to judges (including longer terms of office), and later in the 20th century through "merit selection" and "nonpartisan" elections, the states have sought to protect judges from excessive partisanship and inappropriate political influence. Nearly all 32 states with some form of nonpartisan judicial elections have adopted ethics codes designed to restrict the partisan activities of judicial candidates.

The decision of the Eighth Circuit Court of Appeals on the Supreme Court's remand of the *White* case[6] now threatens to politicize nonpartisan judicial elections. In the Eighth Circuit's *White* decision, the court held unconstitutional Minnesota's restrictions on "partisan activities" providing that judicial candidates "shall not . . . identify themselves as members of a political organization . . . [or] attend political gatherings; or seek, accept, or use endorsements from a political organization."

California Must Stem the Tide

In consistently suggesting that there is no true distinction between judicial elections and elections for political office, lower federal court decisions after *White* have substantially undermined the states' significant efforts to preserve their ability to attract and retain qualified judges, uphold the rule of law, and insulate sitting judges from inappropriate political influence.

Of course, no system of judicial selection or removal is totally devoid of political implications. The special challenge presented by judicial elections, however, is the usual absence of any impartial process for screening the suitability of candidates or for communicating relevant and unbiased information about the candidates to voters. Moreover, the use of elections for the purpose of judicial *removal* greatly compounds the challenge because removal of sitting judges presents much greater and more direct risks to judicial independence than the selection of new judges. Contested judicial elections involving incumbent officeholders thus present the greatest challenge to the ability of the judicial branch to attract and retain qualified judges and, at the same time, protect the independence of current judicial officeholders. The post-*White* decisions of the lower federal courts have greatly exacerbated these challenges.

Protect the Rule of Law

The challenges described in this article erode public trust in state judiciaries, compromise their integrity, and limit their capacity to keep faith with the rule of law. Public trust in the courts is founded on the belief that judicial decisionmaking processes are apolitical and are in that important respect different from those of the other two branches. The rule of law is illusory if a judge's decision must be submitted for approval to the leaders of the other branches of government, or to special interests, or to popular referendum, as a condition of the judge remaining in office.

The American people have as great a right and interest in impartial state courts, where 95 percent of all litigation is conducted, as in an impartial federal judiciary. Yet under these recent decisions Americans will ultimately be left with a two-tier court system: a federal judiciary that—although not fully independent of improper political influence—has, by reason of federal judges' life tenure, much greater ability to safeguard the rule of law, and a substantially weaker state court system that may no longer be able to guarantee its ability to uphold the rule of law or people's individual rights in the face of any concerted political resistance.

These challenges pose significant risks—to elected state judiciaries in general and to the California judiciary in particular—that are not going to go away. The California court system is not immune from these dangers. These challenges to the ability of the California judicial branch to administer justice to all fairly and impartially are real and are presently upon us. It is time for the leadership of the California bench and bar to confront this reality and determine what it can do to stem the tide in California. CR

Roger K. Warren is currently scholar-in-residence at the Administrative Office of the Courts, a former president and chief executive officer of the National Center for State Courts, and a retired judge of the Superior Court of Sacramento County.

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Notes

1. Editorial, "Judicial Politics Run Amok," *New York Times* (Sept. 19, 2006).

2. Editorial, "The Next Filibuster?," *Wall Street Journal* (May 4, 2006).

3. (2002) 536 U.S. 765, revg. *Republican Party of Minnesota v. Kelly* (2001) 247 F.3d 854.

4. (11th Cir. 2002) 309 F.3d 1312.

5. *Kansas Judicial Watch v. Stout* (D.Kan., Oct. 6, 2006, No. 06-4056-JAR) ___ F.Supp.2d ___ (2006 WL 2873792); *Alaska Right To Life Political Action Committee v. Feldman* (D.Al.2005) 380 F.Supp.2d 1080; *North Dakota Family Alliance, Inc. v. Bader* (D.N.D. 2005) 361 F.Supp.2d 1021; *Family Trust Foundation of Kentucky v. Wolnitzek* (E.D.Ky. 2004) 345 F.Supp.2d. 672.

6. *Republican Party of Minnesota v. White* (8th Cir. 2005) 416 F.3d 738 (en banc), cert. denied *sub nom. Dimick v. Republican Party of Minnesota* (2006) 126 S.Ct. 1165.